IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

versus

PLUMBERS AND STEAMFITTERS LOCAL UNION No. 100, etc.,
Respondent.

RESPONDENT'S BRIEF ON THE MERITS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

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STATEMENT OF THE CASE

Some matters of relevance were obscured in Connell's statement of case.

The Plaintiff's Contentions Below

Connell's complaint asserted that efforts by Local 100 to obtain from Connell an agreement to restrict subcontracting to unionized subcontractors violated state and federal antitrust laws. No claim was made

under either sections 301 or 303 of the Labor Act.[1] No claim for damages was made, as Connell sought only declaratory and injunctive relief (A. 32-3, 43). It was Connell's view that the subcontractor agreement "on its face" violated the antitrust laws (A. 48), and:

> "The complaint of Connell in this case contains no allegation of this union's participation in a scheme or conspiracy with a non-labor group to create a monopoly for that non-labor group. In fact, Connell bases its claim on the ground that this contract simply restricts the way in which it is free to carry out its business ... Further questioning by Connell's own counsel established clearly that plaintiff was basing its entire case on the theory that there was a sufficient antitrust violation because the union had restricted Connell in the way that it carried on its business." 483 F.2d at 1165

On appeal Connell has varied the approach somewhat, claiming that a "most favored nations" clause that was once a part of the area collective bargaining contract between Local 100 and the mechanical contractors association forms an integral part of its antitrust claim. The "most favored nations" clause in question (set forth at page 12, fn. 3 of Connell's Brief) was deleted during the June 1973 negotiations and no longer exists in any collective bargaining contract (between) Local 100 and the association.

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[1] 29 USCA 185 and 187.

The Nature of the Contract Between Connell and Local 100

The contract which Local 100 sought, and obtained under protest from Connell, provided that the parties desired "to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor-Management Relations Act," and further that as to on-site construction Connell would subcontract work within the trade jurisdiction of Local 100 only to firms "that are parties to an executed current, collective bargaining agreement with Local 100" (PL. Ex. 4 A. 62, 114). The agreement could be cancelled by either party upon ten days written notice. *Ibid.*

In seeking the agreement with Connell the union in its words, sought "to improve and protect wages and work opportunities" (PL. Ex. 2, A. 59, 110). Nonunion mechanical contractors in Dallas were "too numerous to enumerate" (A. 79) and Connell frequently subcontracted with such nonunion contractors (A. 52-3). One such firm with whom Connell regularly subcontracted was Texas Distributors (A. 108) a firm which Local 100 had unsuccessfully "tried to get a collective bargaining contract with" (A. 79).

The Decisions Below

The trial court concluded that the agreement sought by Local 100 was protected by the construction industry proviso to Section 8(e) and exempt from antitrust sanctions, under the rationale of *Suburban Tile v. Rockford Building Trades*, 354 F.2d 1 (7th Cir. 1965),

that "being authorized by Congress such a contract does not violate Federal Anti-Trust statutes" (A. 41). The Court of Appeals affirmed, without expressly deciding the 8(e) issue. It was the view of the majority that the union was "seeking an agreement involving a legitimate union interest," i.e. "to eliminate competition based on differences in labor standards and wages." 483 F.2d at 1167. The Court recognized that the "central reason that the union wants the agreement ... is that it will be helpful in organizing other subcontractors" *ibid*, and drew a parallel with its earlier *Cedar Crest Hats* decision[2] noting:

> It can readily be seen that construction unions have a direct interest in seeing that general contractors hire subs using union labor much as it is obvious that the hatters had a strong interest in seeing retailers buy for resale only union-made hats." 483 F.2d at 1168.

"Even if the anticompetitive aspects are weighed against the direct benefits," the Court thought it "difficult to find these goals illegitimate" *ibid*. For the only anticompetitive aspect as that the unions have succeeded in eliminating that feature of competition based on lower standards or wages." 483 F.2d at 1169. And although it did not pass upon the 8(e) question the opinion did note that "Congress explicitly recognized the legitimacy of these restrictions on subcontractors wherever the general contractor had union-

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[2] *Cedar Crest Hats Inc. v. United Hatters*, 362 F.2d 322 (5th Cir. 1966).

ized employees of his own. The *anticompetitive* effect does not change that much when the general contractor has no employees of his own". 483 F.2d at 1168.

On this analysis the Court of Appeals majority concluded that "antitrust is not the proper method of handling this problem," 483 F.2d at 1169. With respect to the state antitrust contentions the Court of Appeals, as had the trial Court, disposed of them under the preemption rationale of *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959).

SUMMARY OF ARGUMENT

I

In *Suburban Tile Center v. Rockford Building Trades Council*, 354 F.2d 1, (7th Cir., 1965), which arose on facts indistinguishable from the present case, the court held that since the subcontracting agreement was lawful under §8(e) of the Labor Management Relations Act and since it was lawful to picket to obtain such an agreement under §8(b)(4)

> "it would be unreasonable to hold that success in securing such an agreement constitutes a violation of the anti-trust laws." *Id.* at 3.

Accordingly, we first address ourselves to Connell's contention that the subcontracting agreement herein is unlawful.

The issue turns on the meaning of §8(e) of the LMRA, added in 1959 to close what Congress regarded to be a "loophole" in the law against secondary boycotts. However, by two provisos to §8(e) Congress gave special consideration to the labor relations in the garment industry and the construction industry. Under the construction industry proviso, an agreement between a labor organization and "an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction" is excused from §8(e) even though that contract sanctions secondary conduct.

Connell advances three arguments for removing the contract herein from the proviso. The first, that it is not an "employer in the construction industry" can be dismissed instantly because the Company is a general contractor in that industry and employs various trades. Connell argues more seriously that the agreement is unlawful because the union picketed to obtain it. That contention has been rejected by the Third, Sixth, Seventh, Ninth and District of Columbia Circuits; there are no Court decisions to the contrary. The Third Circuit explained that the proviso

> "was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project." *Essex County and Vicinity District Council of Carpenters v. NLRB*, 332 F.2d 636, 640 (3rd Cir. 1964)

This Court citing *Essex* has agreed. *National Woodwork Mfr. v. NLRB*, 386 U.S. 612, 638-639 (1967). The *Essex* Court pointed out that a requirement that the agreement be entered into voluntarily is inconsistent with this expressed policy, is inconsistent with the broad general language of the proviso, and is inconsistent with §8(b)(4)(A) (as amended in 1959) which makes it unlawful only to picket to require an employer to enter into an agreement forbidden by §8(e).

Connell's final argument on this point is that the subcontracting agreement is not protected by the proviso because there was no collective bargaining relationship between the Company and the union. This proposed limitation on the proviso has also been authoritatively rejected. The General Counsel of the Labor Board has explained at length, in dealing with a charge arising out of this same activity by the same local union, that this contention is so clearly without legal merit as to not warrant the issuance of a complaint. See Appendix A, *infra*. In light of the purpose of the proviso stated by this Court in *National Woodwork*, following *Essex*, quoted *supra*, it is particularly significant that the General Counsel observed, contrary to Connell's present argument, that agreements such as the one in question were commonplace in the construction industry prior to 1959. See p. 24, *infra*.

II

While an agreement expressly protected by the proviso to §8(e) cannot be the basis of an antitrust violation, the converse does not hold. When Congress in

1947 determined to modify the effect of *United States v. Hutcheson*, 312 U.S. 219 (1941), insofar as that decision removed all sanctions from secondary boycotts, it deliberately chose not to reinstate the antitrust remedy which *Duplex Printing v. Deering*, 254 U.S. 443 (1921), had imposed. The House bill would have restored antitrust remedies through a provision (§12 of the Hartley Bill, H.R. 3020) making unlawful "a monopolistic strike or illegal boycott" and providing that the Norris-LaGuardia Act would have no application to "any action or proceeding in a court of the United States involving any activity" defined as unlawful in §12.

The Senate, however, refused to reinstate the antitrust remedy, instead, it provided for simple damages in a suit under a new §303 of the LMRA and for injunctions (under a new §10(1)) which could be obtained only at the instance of the Board. Senator Taft, on whose initiative this remedial compromise was achieved said:

> "Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case we simply provide for the amount of the actual damages."
> II Leg. Hist. 1958, 1398*

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*We throughout refer to the two volume histories of the Labor-Management Relations Act of 1947, and the Labor-Management Reporting and Disclosure Act of 1959, by volume and page, citing the former as Leg. Hist. 1947 and the latter as Leg. Hist. 1959.

These statements were regarded as authoritative by this Court in *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260-261 (1964), in holding only compensatory damages could be obtained for a violation of the secondary boycott provision.

Again, in 1959, while Congress expanded the reach of the secondary boycott prohibition by rewriting §8(b)(4)(A) and adding §8(e), it expressly rejected (this time in the House) of attempts to revive antitrust remedies for such activities. Thus, as the law stands today, Congress has chosen the LMRA as the sole vehicle for regulating union secondary activity.

III

If we are right in urging in part I of this brief that the agreement in question is lawful, then Connell's antitrust agreement under state law is disposed of, in terms, by *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959):

> "We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. * * * Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. * * * Clearly it is immaterial that the conflict is between federal

labor law and the application of what the State characterizes as an antitrust law." *Id.* at 296-297.

And of course, even if the agreement is not protected by the proviso to §8(e), federal remedies would be exclusive. *Teamsters Local 20 v. Morton*, 377 U.S. 252 260-261. (1964)

ARGUMENT

Connell argues that union actions that violate the secondary boycott prohibitions of the Labor-Management Relations Act work a forfeiture of the labor exemption under the federal antitrust laws.[3] The company contends further that the union's picketing for the subcontractor clause in question did violate the secondary boycott provisions of the Labor-Management Relations Act because it was for the purpose of obtaining a contract prohibited by §8(e) of that Act. Rather than taking issue with Connell's assumption

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[3]Connell does seek to embellish its argument by asserting the illegality of the "most favored nations" clause that was at one time contained in the agreement between the union and the Mechanical Contractors Association (of which Connell is not a member). That clause, which is set forth at page 12 of Connell's brief, is not in issue here, for two reasons. First, it did not appear in the subcontractor agreement between the actual parties to this case, and neither the Mechanical Contractors Association nor any of its members was before the courts below with any complaint under any statute. Moreover, that clause no longer exists. It was eliminated in the 1973 negotiations between the union and the Association. To the extent that Connell's arguments are posited upon the existence of that clause, the contentions are now moot. *Allee v. Medrano*, ____ U.S. ____, 94 S. Ct. 2191 (1974); *Golden v. Zwickler*, 394 U.S. 103 (1969).

that this antitrust case turns on the meaning of the LMRA, we assume such to be the case, and demonstrate below that Connell is wrong in both respects. We shall deal first with the company's minor premise and show that the construction industry proviso to §8(e) validates the subcontracting clause here, and, as the 7th Circuit stated: "It would be unreasonable to hold that success in securing such an agreement constitutes a violation of the antitrust laws," *Suburban Tile Center v. Rockford Building Trades Council*, 354 F.2d 1, 3 (7th Cir. 1965) cert. denied 384 U.S. 960 (1966). Thereafter, we treat with the company's major premise and show that Congress has determined that so-called "secondary" activity by labor unions is to be regulated solely by the LMRA and not through the antitrust laws. Finally, we shall show that the Petitioner's state antitrust claim is preempted by federal law — not under the primary jurisdiction doctrine of *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959), but as a matter of substantive supercession under *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959).

I

I. The Subcontracting Agreement Is Lawful Under The Proviso To §8(e) Of The Labor Management Relations Act.

Section 8(b)(4)(A) of the LMRA as amended in 1959 and as it stands today states:

> "(b) It shall be an unfair labor practice for a labor organization or its agents —

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) *forcing or requiring any employer* or self-employed person to join any labor or employer organization or *to enter into any agreement which is prohibited by section 8(e);*" (emphasis added.)

And §8(e) of the LMRA also added in 1959 provides as follows:

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such ex-

tent unenforcible and void: *Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work:* Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception." (Emphasis added.)

Sections 8(b)(4)(A) and 8(e) came into the Act in 1959 as part of Title VII of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). They are a second stage in the evolution of the law of secondary boycotts, which were first prohibited by the original §8(b)(4)(A) of the Taft-Hartley Act, adopted in 1947. See pp. 34 to 40, *infra*. There has been much debate as to the reach of this prohibition. (See e.g.

National Woodwork Manufacturers v. NLRB, 386 U.S. 612 (1967).) But the present case involves nothing approaching the controversy which divided the Court in *National Woodwork*. For, here the subcontracting clause is concededly secondary. In contrast, the issue in *National Woodwork* was whether the "work preservation" clause there was primary or secondary. (386 U.S. at 644-646). One distinction in the construction industry between a lawful "secondary" clause, and a primary clause is that the latter may be enforced by strike and picket activity while the former may not. Compare *National Woodwork, id.*, with *Local Union No. 48 Sheet Metal Workers v. Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964).

The agreement challenged by Connell is clearly between "an employer in the construction industry," Connell, and a "labor organization," Respondent Local 100. It relates only to "the contracting or subcontracting of work to be done at the site of the construction *** of a building, structure, or other work." It is therefore protected by the "construction industry" proviso to §8(e). Finally, since the agreement is protected by that proviso to §8(e) picketing to secure it is lawful. For, §8(b)(4)(A) prohibits only picketing requiring an employer to enter into "any agreement which is prohibited by §8(e)."

In urging the contrary, Connell asserts that it is not an "employer *vis a vis* union, for the purposes of the ... proviso." (Pet. Br. p. 34). But this contention is frivolous because Connell is a general contractor employing carpenters, laborers, bricklayers (A. 53). In-

deed, the company's argument is self-defeating. It does not, and could not argue that it is not in the construction industry. And if it is not an "employer" for the purposes of the proviso to §8(e) then it would not be an "employer" within the prohibition of the body of the section and on that alternative basis, the agreement here would be lawful.

Connell makes the additional argument that the contract is not protected by the construction industry proviso because it was obtained by picketing rather than through the company's voluntary acquiesence. (Pet. Br. 35). This contention has been squarely rejected by the Courts of Appeals that have confronted the point, as well as by the National Labor Relations Board. *Construction, Production & Maintenance Laborers Union, Local 38 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); *Essex County and Vicinity District Council of Carpenters v. NLRB*, 332 F.2d 636 (3rd Cir. 1964); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964); *NLRB v. Muskegon Bricklayers Union*, 378 F.2d 859 (6th Cir. 1967); *Suburban Tile Center v. Rockford Building Trades Council*, 354 F.2d 1 (7th Cir. 1965); *North-Eastern Indiana Building and Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB 854 (1964).

Perhaps the most concise, yet complete, statement of the reasons for this unanimity is the 3rd Circuit's opinion in *Essex County Carpenters, supra*. That Court first explained the background to the adoption of §§8(b)(4)(A) and 8(e):

"It seems essential to the proper construction of the applicable statutory provisions that we first consider the law as it was, and as it applied to the construction industry, prior to the amendments of 1959. Section 8(b) (4) (A) of the Act of 1947, 29 U.S.C.A. § 158(b) (4) (A), declared it an unfair labor practice for a labor organization 'to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, * * * transport, or otherwise handle or work on any goods, articles, materials, * * * where an object thereof is: (A) forcing or requiring any employer * * * to cease using, selling, handling * * * the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *.'

In June of 1951, the Supreme Court, construing the quoted provision, held that a strike, an object of which was to coerce a general contractor to terminate a subcontract held by another employer engaged in the performance of electrical work at the construction site, was an unfair labor practice within the meaning of the statute. National Labor Relations Board v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 685-692. Approximately seven years later the Court held that a boycott voluntarily engaged in by a secondary employer for his own business reasons, and pursuant to the terms of a hot cargo clause contained in a col-

lective bargaining agreement, was not an unfair labor practice within the meaning of the said section. Local 1976, United Brotherhood of Carpenters, etc., v. National Labor Relations Board, 357 U.S. 93, 98-104. It was further held that a union [was] free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees. Ibid, 99. However, the court went on to hold that it was an unfair labor practice for a labor union to encourage or induce a strike or a concerted work stoppage to enforce compliance with the hot cargo clause. Ibid, 105-111. It should be noted that in this case the clause provided that employees 'shall not be required to handle non-union material.'

The widespread resort to the hot cargo clause as a means to circumvent the prohibitions of § 8(b) (4) (A), particularly by the Teamsters Union, led to the enactment of the amendments with which we are here concerned. See Vol. II, Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, 1433, 1707-1709; 2 U.S.Code Cong. and Admin.News (1959), pp. 2382-2384."

After setting out the language of the applicable portions of the Act, the *Essex County Carpenters* Court continued:

"The quoted subsection makes it an unfair labor practice for a union and an employer 'to enter into any contract or agreement, * * * whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, * * * transporting or otherwise dealing in' the products of any other producer or manufacturer. The effect of this provision of subsection (e) was to outlaw all hot cargo clauses containing the proscribed conditions, including those voluntarily agreed upon by the union and the employer. To this extent only the decision of the Court in Local 1976, United Brotherhood of etc. Carpenters v. National Labor Relations Board, supra, 98-104, was nullified. Section 8(b) (4) (A) makes it an unfair labor practice for the union to engage in, or to induce or encourage the employees to engage in, specifically proscribed conduct where an object is to force or require an employer to enter into any such contract or agreement.

The same subsection declares it an unfair labor practice for a union and an employer 'to enter into any contract or agreement' whereby such employer agrees 'to cease doing business with any other person.' However, the proviso creates an exemption applicable in the construction industry but restricted in its application to agreements relating to 'contracting or subcontracting * * * work' to be performed at the construction site. *This limited exemption was granted apparently in recogni-*

> *tion of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project.* The exemption does not extend to other agreements such as those relating to subcontracts for supplies and materials to be transported to and delivered on the construction site. These agreements are covered by the provisions discussed in the foregoing paragraph." (Empha sis added.)

In *National Woodwork*, this Court, citing *Essex County Carpenters*, assigned the same purpose to the proviso:

> "On the other hand, if the heart of § 8(e) is construed to be directed only to secondary activities, the construction proviso becomes, as it was intended to be, a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there, but to ban secondary-objective agreements concerning nonjob-site work, in which respect the construction industry is no different from any other." 386 U.S. at 638, 9

Having traced the history of §8(b)(4)(A), and explained both Congress' reaction, and the purposes that motivated both the prohibition and the "limited exemption" for the construction industry, the 3rd Cir-

cuit confronted the precise argument Connell advances here, viz:

> "that the proviso must be construed as applicable only to a voluntary agreement between the union and an employer. With this contention as a premise, it is argued that resort to specifically proscribed activity as a means to obtain a clause, otherwise legal under subsection (e), is an unfair labor practice within the meaning of § 8(b) (4) (A)."

The Third Circuit responded:

> "The argument has been rejected by each court which has thus far considered it. The fallacy in the argument lies in its erroneous premise. There is nothing in the language of the statute from which it may be inferred that it was the Congressional intent to restrict the exemption to voluntary contracts. The critical phrase in the proviso reads as follows: 'nothing in this subsection shall apply to AN agreement.' (Emphasis supplied.) If it had been the intent of Congress to limit the application of the proviso, it could have manifested this intent simply by substituting the qualifying words 'a voluntary' for the indefinite article 'an.'
>
> "It is further argued that the Board's construction of the provisions here in question is supported by the legislative history. The specific reference is to isolated phrases and sen-

tences quoted out of context. The pertinent legislative history as a whole, as we interpret it, gives no support to the Board's argument. Vol. I, Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, 943-944; Vol. II, Ibid, 1433, 1707-1709. * * *

"Section 8(b)(4)(A) as amended declares it an unfair labor practice for a union to engage in any activity therein proscribed where an object is to force or require an employer to enter into an agreement prohibited as 'unenforcible and void' by subsection (e). However, since the effect of the proviso was to preclude the application of subsection (e) to labor-management agreements relating to subcontracts for work to be performed at the construction site, coercive activity, otherwise illegal, may be employed to obtain such a contract. We should add that such an agreement is not a defense to an unfair labor practice charge made under § 8(b) (4) (B). Local 1976, United Brotherhood of etc. Carpenters v. National Labor Relations Board, Ibid, 105-111. To this extent, there has been no change in the law."

The only points made by Connell here and not dealt with in terms in *Essex County Carpenters*, had earlier been rejected by the Ninth Circuit in *Construction Laborers Union, supra.* In that case, too, it was argued that:

"the proviso 'is not intended to change the law with respect to * * * the legality of a strike to obtain such a contract.' It argues that this adopts by implication as the 'existing law' the decision in N.L.R.B. v. Local 47, International Brotherhood of Teamsters (5 Cir., 1956), 234 F.2d 296."

The Ninth Circuit replied:

"We cannot agree that that ruling constituted 'existing law' in the view of Congress. The phrase quoted from the legislative history is obviously vague and ambiguous. The Local 47 decision is nowhere cited in the legislative history of the 1959 amendments. To refer to it as 'existing law' seems exaggerated to say the least, since it is the only case dealing with this issue and since it preceded the Sand Door case and was not mentioned in the Supreme Court's opinion in that case. Moreover, it is distinguishable in that there was evidence demonstrating a specific intent of the picketing unions to force immediate termination of relations with certain non-union subcontractors." 323 F.2d at 425

Indeed, the Board's decision in *Local 47, Teamsters,* 112 NLRB 923, 925 n.2 (1955), specifically reserved the question:

"Whether the Union's picketing also violated 8(b)(4)(A) insofar as it sought to regulate fu-

> ture dealings by Bateson and McCann with such subcontractors (not as yet identified) as might refuse to meet the Union's wage standards, is a question which we need not and do not decide."

Finally, Connell relies on an analogy to §8(f), whereby Congress did validate only pre-hire agreements voluntarily assumed. The *Construction Laborers Union* Court found the analogy wanting since "the legislative history [of §8(f)] contains statements specifically disclaiming an intention thereby to authorize strikes or picketing to coerce such prehire agreements." 323 F.2d at 425. In contrast there is no such legislative history concerning §§8(b)(4)(A) & 8(e). Presumably if Congress had intended to similarly condition §8(e), it would have similarly "disclaimed" in the legislative history. Indeed, the argument that picketing to secure a §8(e) proviso clause is unlawful, ignores the basic fact that the picketing here at issue is controlled by §8(b)(4)(A), the operation of which expressly depends on unlawfulness under §8(e), and which does not invalidate picketing to secure a subcontracting clause that is *not* prohibited by §8(e).

Connell argues further that the subcontracting proviso is not protected by the §8(e) proviso because it was not made in a collective bargaining relationship.[4]

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[4]Connell's argument is somewhat akin to that rejected by the Court in *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 25 (1962) when it was urged that Section 301 jurisdiction was limited to "agreements concerning wages, hours . . . concluded in direct negotiations between employers and unions entitled to recognition as exclusive representatives of employees."

(Pet. Br. p. 41-42). On April 23, 1974, the NLRB's General Counsel, after thoroughly reviewing the relevant "Supreme Court and Circuit Court decisions, relevant legislative history and the Board's post-*Centlivre* [148 NLRB 154] decision[s]", found that these so completely disposed of this contention that there remained "no basis to establish under current Board law, violations of either Section 8(e) or 8(b)(4)(A) of the Act." For as the District of Columbia Circuit has stated "even picketing is permissible if the coverage of the proposed contract is limited to the type of work which is never performed by the general contractors' own employees" *Dallas Building and Construction Trades Council v. NLRB*, 396 F.2d 677, 682 (D.C. Cir. 1968). The General Counsel has therefore refused even to issue a complaint to test the matter further. We have appended his decision hereto as Appendix A.

The company's argument rests in part on Senator Kennedy's statement that the §8(e) proviso was enacted "to avoid damage to the pattern of collective bargaining in the industry" (Pet. Br. p. 42), and Congressman Frelinghuysen's identical statement in the House (Pet. Br. at 41). But the company's undocumented assertions (Pet. Br. p. 42) regarding the pattern of collective bargaining in the construction industry[5]

[5]At least as early as the 1930's building trades unions have sought to obtain agreements or understandings with general contractors not to subcontract their work to nonunion employers. See *Levering and Garrigues Company v. Morrin*, 71 F.2d 284 (2nd Cir. 1934) cert. denied 293 U.S. 595 where the Ironworkers union sought to induce "owners, architects, or general contractors to let no subcontracts to plaintiffs for the erection of structural iron and steel on buildings," because the plaintiffs

are refuted by what the General Counsel said on this same point:

> "Organizing in the building and construction industry both prior to and subsequent to the 1959 amendments, was and is primarily carried on by building and construction trades councils on behalf of their constituent craft locals. The building trades agreements proffered are not conventional collective-bargaining agreements, nor is a conventional collective-bargaining relationship sought, but rather an attempt is made to obtain skeleton agreements (containing little more than subcontracting provisions) which in turn are augmented by the execution of collective-bargaining agreements by the individual trade unions, the latter agreements containing provisions governing wages and other substantive conditions of employment. As the Court observed in *Dallas Building and Construction Trades Council* v. *N.L.R.B.*, 396 F.2d 677 (C.A. D.C.), at p. 682:
>
> ". . Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry; and in 1959 'umbrella' agreements like the one

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were members of an open shop organization. See generally, 84 Monthly Labor Review No. 7 at 716 (July 1961), where the Department of Labor found before 1959 "a large group of construction industry contracts which required the subcontractor to be under agreement with the same local with another local of the same international union, with a recognized building trades union or with an AFL-CIO affiliate."

> proposed here were, as they are today, commonplace, for collective-bargaining is traditionally conducted at several levels in the construction industry . . ."

Under this arrangement the building and trades council is as much as a "stranger" to the general contractor and his employees, if any, as the Plumbers Union was to Connell. The subcontracting clause encased in such a trades council "shell" agreement can no more be said to be obtained in the context of a collective-bargaining relationship than the proviso agreement sought or obtained in such cases as *Colson and Stevens, supra, Centlivre, supra,* and *Church's Fried Chicken, supra.*[6]

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[6]A recent decision, *Danielson v. Ladies Garment Workers Joint Board*, 494 F.2d 1230 (2nd Cir. 1974), deals with the garment industry proviso to 8(e). The ILGWU had picketed a manufacturer for a jobbers' agreement which, as the Plumbers' agreement here, disclaimed any application to the employer's own employees and any desire for recognition. The ILGWU agreement prohibited the jobber from contracting with any employers who were not under a contract with the union. The Court in an appeal from grant of a 10(L) injunction, reversed, holding that "this kind of picketing in the garment industry comes within the policy exemption provided by the Congress in Section 8(e)." The Board has now also considered the underlying facts in the *Danielson* case and held "the purpose of the Respondent's picketing was to force Hazantown to agree to use contractors who had recognized and bargained with the Respondent as a representative of their employees, an object which we find to be protected by the garment industry proviso contained in Section 8(e), and not in any way prohibited under Section 8(b)(7)" *Joint Board of Garment Workers,* 212 NLRB No. 106 (Aug. 8, 1974).

Perhaps because it was not cited to him, the General Counsel did not deal with the statement of Senator McNamara on which petitioner also relies (Pet. Br. p. 41). In the paragraph immediately preceding the passage cited by Petitioner, Senator McNamara said: "This proviso embraces and covers all forms of contracting or subcontracting clauses in agreements between building and construction contractors and building trades unions with respect to work to be done at the job-site." II Leg. Hist. 1959, 1815. That is the exact proposition for which we contend. Senator McNamara's reference to agreements between plumbers locals and "their contractors" concerns a specific application of that general proposition — and not the meaning of the 8(e) proviso. It is clear both from the salient portion of his statement, which Petitioner omits, and from the context of his entire remarks that Senator McNamara was not suggesting the proviso covered only agreements between plumbing contractors and "unions representing their employees" (Pet. Br. p. 41).

Of course, the language of § 8(e) itself gives no comfort to the company's argument. For the term "agreements' 'is unmodified,[7] and as we have noted above, the only conditions for the proviso's application with respect to the parties thereo, are that one a labor organization and the other an "employer in the

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[7]Compare, "Congress knew well the phrase 'collective bargaining contracts' . . had Congress contemplated a restrictive differentiation, we may assume that it would not have eschewed 'collective bargaining contracts' unwittingly." *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 25 (1962).

construction industry." To read a further limitation into the term "agreement" would be anomalous because the same term is used in the main portion of § 8(e), which declares the broad prohibition applicable to all but two industries. If the term "agreement" were qualified as suggested by Connell, it would presumably be lawful for the Teamsters to enter into an agreement with an employer, who hires no Teamsters, whereby that employer promises, for example, not to ship freight with non-union motor carriers. This would introduce a new "loophole" into the statute which we do not have the temerity to advance. The only basis on which the company's argument could be accepted is that the term "employer" has different meanings in the main portion of §8(e) and in its construction industry proviso. This Court's unanimous holding with respect to another of the 1959 amendments to the secondary boycott provisions of the LMRA is responsive here.

> It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. Moreover, a primary target of the 1959 amendments was the secondary boycotts conducted by the Teamsters Union, which ordinarily represents employees not of manufacturers, but of motor carriers. There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an

> exception, and we see no basis for attributing such an incongruous purpose to Congress. *NLRB* v. *Servette,* 377 U.S. 46, 55 (1964) (footnote omitted)

The foregoing shows that Connell's §8(b)(4)(A) and §8(e) argument rests on a misreading of the terms "employer" and "agreement" in the §8(e) proviso. Once those terms are given their natural and proper construction it is plain that this case is indistinguishable from *Suburban Tile Center, supra,* 354 F.2d 1. There plaintiffs brought an antitrust claim premised on the view that the successful use of economic force to secure a subcontracting agreement violates the antitrust laws. In the *Suburban Tile* complaint the:

> "Plaintiffs assert that defendant Building Contractors Association of Rockford, Inc., which represents a majority of the contractors and sub-contractors engaged in the construction industry and various allied industries in Winnebago County, Illinois, (hereinafter sometimes called the 'Contractors' Association') entered into an agreement with defendant Rockford Building and Construction Trades Council of Rockford, Illinois, Winnebago County (which consists of representatives of about twenty local unions, including defendant United Brotherhood of Carpenters and Joiners of America, Local 792 of Rockford Illinois, and the Marble, Tile and Terrazzo Workers, Members of Subordinate Union #31

of Rockford, Illinois) hereinafter sometimes called the 'Trades Council.'

"Plaintiffs further allege that the agreement precluded the signatory contractors from contracting for work commonly done by the craft union members of the Trades Council with anyone who does not have a collective bargaining agreement with the Trades Council or the local craft union (affiliated with the Trades Council) which commonly has jurisdiction over the class of work involved. The agreement provided that any contractor who was not a member could receive the benefits and assume the obligations of the agreement by signing an exact copy of it.

"The plaintiffs assert that defendant Suarez Brothers Construction Co., Inc., (hereinafter sometimes called 'Suarez Bros.') became a party to the alleged unlawful conspiracy by signing what was in effect an exact duplicate of the agreement on or about June 21, 1963. There was a prior similar collective bargaining agreement entered into between Suarez Bros. and the Trades Council on November 9, 1962, with reference to 'the construction of apartment buildings project, west of Machesney Airport, Rockford, Illinois.'

"On or about May 6, 1963, plaintiff Suburban Tile Center, Inc., with its principal offices in Cook County Illinois, (hereinafter sometimes

called 'Suburban Tile') entered into an agreement with Suarez Bros. as general contractor, to sell and install prefabricated tile at an apartment building project west of the Machesney Airport, Rockford, Illinois, known as the 'Presidential Courts Project.'

"Plaintiffs assert that because of threats of such steps as work stoppages and lawsuits, by members of the local unions affiliated with the Trades Council, Suarez Bros. entered into the above-mentioned agreement of June 21, 1963.

"Thereafter, the Trades Council sought and secured a court injunction from the Circuit Court of Winnebago County, Illinois, permanently enjoining Suarez Bros. from hiring or subletting work to persons or firms having no collective bargaining agreement with the Trades Council or its union affiliates. Suarez Bros. then directed plaintiff Suburban Tile to cease doing the work at the Presidential Courts Project site." (*Id.* at 2-3.)

The Seventh Circuit rejected that anti-trust claim because:

"A construction subcontracting agreement has been held to be a mandatory subject of collective bargaining. Orange Belt District Council of Painters No. 48, AFL-CIO v. N.L.R.B., 1964, 117 U.S. App. D.C. 233, 328 F.2d 534, 537; Building and Construction Trades Council of San

> Bernardino & Riverside Counties v. N.L.R.B., 1964, 117 U.S. App. D.C. 239, 328 F.2d 540. Economic action to secure such agreements has been allowed. Essex County and Vicinity District Council of Carpenters etc. v. N.L.R.B., 3 Cir., 1964, 332 F.2d 636, 641; Construction, Production & Maintenance Laborers Union, Local 383, AFL-CIO v. N.L.R.B., 9 Cir., 1963, 323 F.2d 422, 425. In the face of these decisions, it would be unreasonable to hold that success in securing such an agreement constitutes a violation of the anti-trust laws."

That court was correct both on the governing LMRA law and the consequence of that law for antitrust claims such as the one made here.

II. Even If The Subcontracting Agreement Were Illegal Under The National Labor Relations Act, This Would Not Give Rise To A Violation Of The Anti-Trust Laws.

We accept as essentially accurate Connell's description of the history of the labor exemption up until 1947, particularly its recognition that the pivotal decision in *United States* v. *Hutcheson*, 312 U.S. 219 (1941) "involved a jurisdictional dispute that caused the losing union to institute a secondary boycott" and that this Court "held the secondary boycott of *Hutcheson* immune from the anti-trust laws" (Pet. Br. pp. 19-20).[8]

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[8]As appears from both the opinion of the Court (*id.* at 227-228) and the concurring opinion of Justice Stone (*id.* at 237-238) the

Where Connell goes seriously astray is in its reading of the following passage in *National Woodwork:*

> "In effect Congress, in enacting 8(b)(4)(A) of the Act, returned to the regime of *Duplex Printing Co.* and *Bedford Cut Stone.* Id. at 632." (Pet. Br. p. 20)

Connell's error is that it fails to appreciate that while Congress in 1947 may have returned to the substantive law of the *Duplex* and *Bedford* cases, it deliberately chose not to utilize the anti-trust laws but rather elected to regulate secondary boycotts through remedies Congress established under the Labor Manage-

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indictment charged the union with both a jurisdictional dispute and a secondary boycott. In holding that this conduct could not, given the Norris-LaGuardia Act, be punished under the Sherman Act, the Court held:

> "The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the 'public policy of the United States' in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the Duplex case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." *(Id.* at 231; footnote omitted)

ment Relations Act.[9] An examination of the course of this issue through the legislative process will demonstrate that Congress carefully considered the anti-trust remedy and expressly rejected it.

The Taft-Hartley Bill of 1947

On April 17, 1947, the House passed and sent to the Senate H.R. 3020 (the Hartley Bill) (I Leg. Hist. 1947, 863). Section 12 of the bill defined "unlawful concerted activities" to include a "monopolistic strike, or illegal boycott," and provided that the Norris-LaGuardia Act should have no application to "any action or proceeding in a court of the United States involving any activity" defined as unlawful in Section 12. (Id. at 204-6). House Report 245, which accompanied the bill, explained that illegal boycotts included "direct restraints of trade designed to compel people against whom they are engaged in to place their business with some other than those they are dealing with at the time..." Id. at 315. The report explained the underlying purpose of Section 12:

> "Under this section, these practices are called by their correct name, 'unlawful concerted activities.' It is provided that any person injured in his person, property, or business by an unlawful concerted activity affecting commerce

[9]This is an instance in which "the longtime failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one," *Apex Hosiery v. Leader*, 310 U.S. 469, 488 (1940).

> may sue the person or persons responsible for the injury in any district court having jurisdiction of the parties and recover damages. The bill makes inapplicable in such suits the Norris-LaGuardia Act, which heretofore has protected parties to industrial strife from the consequences of their lawlessness, no matter how violent their disputes became." Id. at 335.

The same issue was considered in the Senate Committee on Labor and Public Welfare. That Committee also decided to outlaw secondary boycotts, but did not propose excepting them from Norris-LaGuardia. Instead, the Senate Committee provided that the secondary boycott would be an unfair labor practice and that such boycotts could be enjoined on application of the National Labor Relations Board. No provision for private suits, either for injunctive relief or for damages, was included in the bill as reported to the Senate. Senate Report No. 105 which accompanied Senate Bill 1126 framed the issue:

> "The problem of the inadequacy of existing laws on industrial relations is one of grave national concern. The basic Federal law on this subject is contained in two statutes — the Norris-LaGuardia Act of 1932 and the National Labor Relations Act of 1935...
>
> While the committee does not believe that social gains which industrial employees have received by reason of these statutes should be impaired in any degree, *we do feel that to the*

extent that such statutes, together with the regulations issued under them, and decisions regarding them, have produced specific types of injustice, or clear inequities between employers and employees, Congress should remedy the situation by precise and carefully drawn legislation.

* * *

The need for such legislation is urgent. *Supreme Court interpretations of the Norris-LaGuardia Anti-injunction Act and the Clayton Act seem to have placed union activities, no matter how destructive to the rights of the individual workers and employers who are conforming to the National Labor Relations Act, beyond the pale of Federal law.*

* * *

After a careful consideration of the evidence and proposals before us, the committee has concluded that five specific practices by labor organizations and their agents, affecting commerce, should be defined as unfair labor practices. Because of the nature of certain of these practices, especially jurisdictional disputes, and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect

> the public welfare which is inextricably involved in labor disputes." I Leg. Hist., 1947, 407-8 (emphasis added)

In supplemental views, four members of the Committee, including Senators Taft and Ball, declared their intention to offer specific floor amendments one of which in their words:

> "removes the protection of the Clayton Act from monopoly agreements to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions on the purchase, sale, or use of material, machines, or equipment. While the existence of the union should not be a combination in restraint of trade, we see no reason why unions should not be subject in this field to the same restriction as are competing employers." I Leg. Hist. 1947, 456, 461-2.

In conformity with his expressed intent, during the course of floor debate, Senator Ball offered an amendment[10] which he described as:

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[10]The Ball Amendment provided in part:

> "(d) The provisions of sections 6 and 20 of the act entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.' approved October 15, 1914, and the provisions (except sec. 7, exclusive of clauses (c) and (e) and secs. 11 and 12) of the act entitled 'An act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.' approved March 23, 1932, shall not be applicable in respect of violations of subsection (a) [subsection (a) defined the proscribed secondary boycotts] or in respect of any

"... designed to correct the interpretation of the Norris-LaGuardia and Clayton acts made by the Supreme Court in the Hutchinson (sic) case and a number of other cases brought by former Assistant Attorney General Thurman Arnold, when he attempted to break up monopolistic practices on the part of labor unions, sometimes acting on their own, sometimes in conspiracy with employers." II Leg. Hist. 1947, 1354

Senator Taft, however, opposed the Ball amendment, explaining his opposition:

"My views on the subject of the Ball amendment are stated in the supplemental views found on page 4 of the majority report. I do not change those views. However, in the progress of the consideration of a bill the Senator in charge of it should judge the temper of the Senate and the action which should be taken. I found that opposition to restoring the injunctive process even in cases of secondary boycotts and jurisdictional strikes, seemed to be so strong, and I am so anxious to retain provisions covering the right of direct action in

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contract, combination, or conspiracy, in restraint of commerce, to which a labor organization is a party, if one of the purposes of such contract, combination, or conspiracy is to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions upon the purchase, sale or use of any material, machines, or equipment." Id. at 1324.

> suits brought for damages in cases of that kind, that I have determined that I shall vote against the Ball amendment and then offer the substitute, which provides for direct suits in cases of secondary boycott." II Leg. Hist. 1947, 1365.

In subordinating his personal views to the practical necessity of securing sufficient votes in the context of "a predictable Presidential veto", *Pipefitters Local v. U.S.*, 407 U.S. 385, 409 (1972). Senator Taft performed a leadership function which this Court has repeatedly recognized. See this Court's adoption of Senator Taft's limiting constructions of 8(b)(1)(A), *NLRB v. Drivers Local Union No. 639*, 362 U.S. 274, 287-288, (1960) and *NLRB v. Allis-Chalmers*, 388 U.S. 175, 185-190 (1967), of the reach of 8(b)(6), *ANPA v. NLRB*, 345 U.S. 100, 106-111 (1953); see *Florida Power & Light Co. v. Electrical Workers*, ____ U.S. ____, 94 S.Ct. 2737, 2744 (1974).

The Ball Amendment was defeated by a vote of 62-28 (II Leg. Hist. 1947, 1369-1370).

Senator Taft, as promised, promptly offered his amendment which contained what ultimately became §303 of the Act. He made clear that the effect of his bill "is only to restore to people who lose something because of boycotts and jurisdictional strikes the money which they have lost." II Leg. Hist. 1947, 1371. When Senator Morse objected to potential liabilities for unions under §303, Senator Taft contrasted the remedy provided under his amendment with that of the Sherman Act:

> "Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case we simply provide for the amount of the actual damages." II Leg. Hist. 1947, 1398.

These statements by Senator Taft have previously been cited by this Court as authoritatively establishing the Congressional policy that only compensatory damages are permitted in private suits for secondary boycott violations. *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260, n. 16 (1964).

Senator Taft's amendment was adopted[11] and was part of the bill as it was passed by the Senate. In the conference between the House and the Senate, the House receded on §12 of H.R. 3020 and accepted the Senate approach.[12] Compare, *e.g.*, (*N.L.R.B. v. Drivers' Local Union 639*), 362 U.S. 274, 285-290 (1960).

Thus, Congress determined to regulate union secondary activity, through the L.M.R.A. and to remedy (it) in part by allowing suits for compensatory damages, and to withhold the more drastic remedies of the antitrust laws.

The Landrum-Griffin Bill of 1959

We have seen that §§8(b)(4)(A) and 8(e) in the present statute were enacted in 1959 as a second step

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[11]II Leg. Hist. 1947, 1400.
[12]I Leg. Hist. 1947, 562-563, 571.

in the Congressional regulation of union secondary activity through the LMRA. During the consideration of the 1959 amendments to that Act, Congressman Alger argued for antitrust regulation of such union activity:

> "Court decisions which removed labor organizations from antitrust laws were handed down in 1941 by the Supreme Court by United States against Hutcheson when the Court, in effect, said:
>
> 'If you are a labor union and you determine in your mind that what you desire to do — although unlawful to everybody else — is in the self-interest of your union, it becomes legal. No matter how much damage this activity may inflict upon the economy, society, or individuals, it is legal — because you say it is in the union's self-interest.'
>
> Then, in a 1945 decision, the Court opened the door still wider to union freedom from legal restraint. In simple terms, it said:
>
> 'Labor unions have a license to impose whatever economic restraints they wish * * * without regard to their effect upon the rest of society.' "

II Leg. Hist. 1959, 1570; see also id. at 1507.

In response Congressman Griffin advised the House, speaking on his own behalf and for Congressman Landrum "that if amendments are offered on the floor

to add antitrust provisions ... I, for one, will oppose them"; *id.* at 1572. Thereafter the House rejected on a voice vote an amendment which provided that nothing contained in the Labor Act or in the Norris-LaGuardia Act

> "shall be deemed to exempt from the application of the antitrust laws of the United States or of any state or territory thereof any employer, labor organization, or other person who becomes a party to or engages or participates in any such contract, combination or conspiracy in restraint of trade or commerce," id. at 1685.

Again, as in 1947, Congress chose amendment to the Labor Act as the sole vehicle for regulating union secondary activity, and rejected attempts to revive antitrust remedies for those activities.

In *Morton*[13] this Court determined the outer limits of Section 303, concluding that "the congressional judgment, reflected both in the language of the federal statute and in its legislative history, [demonstrate] that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by Section 303 should be limited to actual, compensatory damages." 377 U.S. at 260. In the court's view Congress spoke with "great particularity" in describing the type of conduct to be made subject for a private damage action in Section 303 and in determining

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[13] *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964).

"which forms of economic pressure should be prohibited by Section 303 Congress struck the 'balance between the uncontrolled power of management and labor to pursue their respective interests' ". id. U.S. at 258-9.

Against this backdrop, the Court of Appeals in this case properly concluded:

> "But no where has Congress ever said that a violation of the labor laws should give rise to treble antitrust damages, possible criminal punishments, and attorney's fees for the plaintiffs. Yet, allowing this suit to continue as an antitrust action merely because a violation of the labor laws was found would involve these punishments." 383 F.2d at 1170.

III. The Texas Anti-trust Laws Are Not Applicable To This Controversy.

As an alternative to its federal antitrust claim Connell invokes the Texas antitrust laws. Whether or not this controversy is within the primary jurisdiction of the National Labor Relations Board pursuant to the doctrine of *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959) as the Court below held,[14] it is without

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[14]We, of course, agree with the court below that, notwithstanding the dissent in *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1970), the *Garmon* doctrine is "still the law of the land." However, given *Meat Cutters* v. *Jewel Tea*, 381 U.S. 676, 684-688 (1965) there is some question as to whether the *Garmon* doctrine is applicable here. Since the alternative doctrine of substantive supersession (see e.g. *Teamsters Local 20* v.

question placed beyond state control by Federal law. The case directly in point is *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959) which petitioner, rather incredibly, cites in support of state jurisdiction. (Pet. Br. p. 46).[15]

In *Oliver* this Court reasoned:

> "We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Cf. California v Taylor, 353 US 553, 566, 567. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.

Morton, 377 U.S. 252 258-260 and *Beasley* v. *Food Fair Inc.*, ____ U.S. ____ 94 S.Ct. 2023 (1974) and, specifically, its application in *Teamsters Union* v. *Oliver*, 358 U.S. 283, plainly serves to oust state law, the relationship between *Garmon* and *Jewel Tea* in this area need not be resolved.

[15]Petitioner also cites *Giboney* v. *Empire Ice & Storage Co.*, 336 U.S. 490 (1949), a case which arose under the Missouri antitrust law (Pet. Br. p. 46). But as this Court said in *Weber* v. *Anheuser-Busch*, 348 U.S. 468 (1955), which arose under the same state statute:

> The Missouri Supreme Court relied upon Giboney v. Empire Storage & Ice Co., 336 US 490, for the proposition that a state court retains jurisdiction over this type of suit. But Giboney was concerned solely with whether the State's injunction against picketing violated the Fourteenth Amendment. No question of federal preemption was before the Court; accordingly, it was not dealt with in the opinion.

(348 U.S. at 481, n. 9)

Hill v Florida, 325 US 538, 542-544, 89 L ed 1782, 1784-1786. Cf. International Union, etc., Workers v O'Brien, 339 US 454, 457; Amalgamated Asso. v Wisconsin Employment Relations Board, 340 US 383; Plankinton Packing Co. v Wisconsin Employment Relations Board, 338 US 953. The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. Cf. Algoma Plywood & Veneer Co. v Wisconsin Employment Relations Board, 336 US 301, 307-312. Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. See Railway Employes' Dept. A. F. of L. v Hanson, 351 US 225, 232. Clearly it is immaterial that the conflict is between federal labor law and the application of what the State characterizes as an antitrust law. ... Congress has sufficiently expressed its purpose to ... exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade. Weber v Anheuser-Busch, Inc., 348 US 468, 481." 358 U.S. at 296-297 (footnote omitted).

The foregoing conclusively disposes of petitioner's state law claim.[16]

CONCLUSION

We respectfully submit that the Court of Appeals decision be affirmed.

Respectfully submitted,

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ATTORNEY FOR
RESPONDENT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of September, 1974.

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[16]Of course, even if the subcontracting agreement is not protected by the proviso to §8(e) the remedial scheme of federal law is exclusive. *Teamsters Local 20* v. *Morton*, 377 U.S. 252, 260-261.

APPENDIX

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570 May 1, 1974

Re: Plumbers & Steamfitters, Local 100
(Hagler Construction Company)
Case No. 16-CC-447

William L. Keller, Esquire
Clark, West, Keller,
Sanders & Ginsberg
2424 First National Bank Bldg.
Dallas, Texas 75202

Dear Mr. Keller:

Your appeal in the above case has been carefully considered and is hereby denied.

The facts of the case show that the charged Union (Plumbers & Steamfitters, Local 100) picketed the Charging Party (Hagler Construction Company) for the purpose of forcing Hagler to sign a subcontracting agreement providing for all prospective on-site heating, air conditioning and duct work to be subcontracted only to employers having a collective-bargaining agreement with Local 100. At the time of the picketing, Hagler employed no employees engaged in heating and air conditioning work and there was no collective-bargaining relationship between Hagler and Local 100.

The issues arising from these facts are whether the above subcontractor agreement violates Section 8(e) of the Act, despite the construction industry proviso to 8(e), and whether Local 100's picketing to obtain the agreement thus violated Section 8(b)(4)(A) of the Act. An analysis of these issues and our conclusion is attached.

Very truly yours,
Peter G. Nash
General Counsel
/s/ ROBERT E. ALLEN
Robert E. Allen
Director, Office of Appeals

cc: Director, Region 16
Plumbers & Steamfitters, Local 100, 3629 West Miller Road, Garland, Texas 75041
Hagler Construction Co., 5327 North Central Expressway, Dallas, Texas 75205
David R. Richards, Esquire, 600 West 7th Street, Austin, Texas 78701

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

PICKETING TO OBTAIN 8(e) PROVISO AGREEMENTS IN CONSTRUCTION INDUSTRY

A number of cases have raised the issue of whether a construction union violates sections 8(b)(4)(A)

and/or 8(e) when it seeks or obtains by picketing an otherwise valid on-site construction subcontracting clause under the 8(e) proviso from a contractor who does not himself employ employees of the craft represented by that union.

The contentions of the Charging Parties as well as a number of arguments developed by the General Counsel's office itself, have been considered in detail as has been the recent decision of the Fifth Circuit Court of Appeals in the *Connell* case.[1] The General Counsel has concluded, for the reasons discussed fully below, that there is not sufficient basis to authorize complaint in these cases.

While not directly attacking the Board's holding in *Centlivre*,[2] it has been contended that an agreement entered into by or sought between the contractor and the union is not within the privilege of the construction industry proviso to Section 8(e), and that the union's conduct to obtain the agreement accordingly violated the Act, because the contractor did not employ employees of the craft represented by the union and had no collective-bargaining relationship with the union.[2A]

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[1] *Connell Construction Company v. Plumbers & Steamfitters Local No. 100*, 5th Circuit, 72-1243, August 23, 1973.

[2] *Northeastern Indiana Building and Construction Trades Council, et al. (Centlivre Village Apartments)*, 148 NLRB 854, enforcement denied on other grounds, 352 F.2d 606 (C.A. D.C.).

[2A] Alternatively, it is argued that, although the agreement may be privileged under the 8(e) construction proviso, the absence of a collective-bargaining relationship between the contractor from whom the agreement is sought and the union seeking the agreement, renders economic action by the union violative of Section 8(b)(4)(A). However, the Board has made it clear

As the initial point of departure, the Board's decision in *Centlivre, supra,* which has been uniformly followed since its decision ten years ago, is now settled law for the General Counsel. The Board there accepted the view of all those Circuit Courts of Appeal which had passed on the issue[3] and had uniformly rejected the Board's prior view.[4] The Board in *Centlivre* held, as had the Courts, that a union's strike to *obtain* an agreement which would be privileged under the construction industry proviso did not violate Section 8(b)(4)(A).[5] The Board there stated:

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that picketing to obtain such a clause is not violative of Section 8(b)(4)(A), if the clause is within the construction proviso. (See e.g. fn. 19, *supra.*) Thus the basic issue remains whether the sought-after clause comes within the proviso.

[3] *Construction, Production & Maintenance Laborers Union, Local 383, et al.* v. *N.L.R.B. (Colson and Stevens Construction Co.),* 323 F.2d 422 (C.A. 9); *Essex County and Vicinity District Council of Carpenters and Millwrights; United Brotherhood of Carpenters, etc. (Associated Contractors of Essex County, Inc.)* v. *N.L.R.B.,* 332 F.2d 636 (C.A. 3); *Orange Belt District Council of Painters No. 48, AFL-CIO, et al. (Calhoun Drywall Co.)* v. *N.L.R.B.,* 328 F.2d 534 (C.A. D.C.). See also *Local Union No. 48 of Sheet Metal Workers* v. *Hardy Corp.,* 332 F.2d 682 (C.A. 5).

[4] The Board's prior view set out in *Colson and Stevens,* 137 NLRB 1650, was that only voluntary agreements were within the construction industry proviso to Section 8(e).

[5] Section 8(b)(4)(A) of the Act, as amended by the Landrum-Griffin Act of 1959, makes it an unfair labor practice for a union to induce employees to strike or to threaten, coerce or restrain any person where an object is:

> (A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e).

Section 8(b)(4)(B) could nevertheless, as in *Centlivre* itself, be violated if the union's conduct sought the breaking of an existing business relationship at the site of construction, i.e., had an immediate cease doing business object.

> Subsequent to the issuance of *Colson and Stevens,* however, United States Courts of Appeals for three separate circuits have considered and uniformly rejected the above analysis and conclusion. In essence these cases hold that the Board failed to give sufficient scope to the construction industry proviso to 8(e).

In view of the *Centlivre* holding, the Section 8(b)(4)(A) and Section 8(e) issues of the instant cases turn on whether the agreement entered into or sought between the contractor and the union would violate Section 8(e) for the reasons urged by the Charging Parties.

Section 8(e) provides in pertinent part:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, altera-

tion, painting or repair of a building, structure, or other work . . . ."

Since the Union here is a "labor organization" and the contractor "an employer in the construction industry," and since their agreement is confined to the work to be done at the site of construction, the agreement clearly comes within the language of the proviso to Section 8(e). Left then are the contentions of the Charging Parties that there are two alternative implicit preconditions to the validity of an agreement otherwise within the construction industry exemption: (1) that there be an existing collective-bargaining relationship between the parties to the agreement; or (2) that the employer party employ employees doing the kind of work covered or to be covered by the agreement. These contentions are now considered.

While recognizing that a proviso to a general statutory prohibition is to be narrowly construed, the contentions of the Charging Parties cannot be considered on mere axioms of interpretation since the purpose and scope of the construction industry proviso has been the subject of substantial Board and Court litigation in the almost 15 years since its enactment.

The issues here raised involve, of course, a *"secondary"* agreement to be applied to work at a site of construction and not a primary agreement.[6] That a pri-

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[6]The distinction from cases involving "primary" objects such as union recognition sought through direct (picketing) pressure on an employer is set out in the Court's decision in *Dallas*

mary agreement would be wholly outside the ambit of Section 8(e) is made clear by the Supreme Court in *National Woodwork Manufacturer's Assn.* v. *N.L.R.B.*, 386 U.S. 612, where the Court, in discussing the proviso to Section 8(e) in relation to the "central theme" of the Section, stated:

> "However, provisos were added to § 8(e) to preserve the *status quo* in the construction industry, and exempt the garment industry from the prohibitions of §§ 8(e) and 8(b)(4)(B). This action of the Congress is a strong confirmation that Congress meant that both §§ 8(e) and 8(b)(4)(B) reach only secondary pressures. If the body of § 8(e) applies only to secondary activity, the garment industry proviso is a justifiable exception which allows what the legislative history shows it was designed to allow, secondary pressures to count-

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Building Trades Council v. *N.L.R.B.*, 396 F.2d 677, 682 (C.A. D.C.):

> The Board's responses to these arguments are, however, convincing. First, there is no inconsistency between the Board's interpretation of Section 8(b)(7) and the purposes of Section 8(e). It simply does not follow from the fact that the agreement would be lawful if voluntarily adopted that a labor organization can employ illegal means to obtain it. *Section 8(b)(7) and 8(e) are aimed at wholly different problems.* And the proscriptions of Section 8(b)(7) do not vary with the legality of the agreement sought. Picketing to obtain a wage agreement, for example, is no more lawful than picketing to obtain a hot cargo clause. (Emphasis supplied.)

See also *Building and Construction Trades Council of Philadelphia and Vicinity (Samuel E. Long, Inc.)*, 201 NLRB No. 42, 1973, enfd. 485 F.2d 680 (C.A. 3, 1973).

eract the effects of sweatshop conditions in an industry with a highly integrated process of production between jobbers, manufacturers, contractors and subcontractors. First, this motivation for the proviso sheds light on the central theme of the body of § 8(e), from which the proviso is an exception. Second, if the body of that provision and § 8(b)(4)(B) were construed to prohibit primary agreements and their maintenance, such as those concerning work preservation, the proviso would have the highly unlikely effect, unjustified in any of the statute's history, of permitting garment workers, but garment workers only, to preserve their jobs against subcontracting or prefabrication by such agreements and by strikes and boycotts to enforce them. Similarly, the construction industry proviso, which permits 'hot cargo' agreements only for jobsite work, would have the curious and unsupported result of allowing the construction worker to make agreements preserving his traditional tasks against jobsite prefabrication and subcontracting, but not against nonjobsite prefabrication and subcontracting. On the other hand, if the heart of § 8(e) is construed to be directed only to secondary activities, the construction proviso becomes, as it was intended to be, a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close com-

munity of interests there,[32] but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other. The provisos are therefore substantial probative support that primary work preservation agreements were not to be within the ban of § 8(e)." (At 637-639)

"[32]See *Essex County and Vicinity Dist. Council of Carpenters* v. *Labor Board*, 332 F.2d 636 (C.A. 3d Cir. 1964); Comment, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L.J. 673, 684-689 (1951)."

The Court's statement has, of course, pointed significance concerning both the legislative purpose underlying the construction industry proviso and the contentions of the Charging Parties here. Thus the Court, as noted above, stated that the proviso was:

". . . intended to be, a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there,[32] but to ban any secondary objective agreements concerning non-jobsite work, in which respect the construction industry is no different from any other."

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[32]*Supra.*

The Court's citation at footnote 32 to the Third Circuit's decision, *Essex County, supra,* amplifies the

meaning of "close community of interests" at the construction site,[7] which underlies the exemption.

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[7]The Court's citation of the Yale Law Journal Comment is equally significant. That Comment, published shortly before the Supreme Court's decision in *Denver Building*, expressed, at the pages cited, disagreement with the Board's finding of violation in the case because of the relationships at a construction site. On page 689 of the Comment this view is set forth as follows:

> "The general contractor in the construction industry is in a significantly different position. Unlike B, in the example above, the general contractor's own labor policies are the reason his place of work is being picketed. For he has brought onto the job a non-union subcontractor. This, as Judge Clark pointed out in his dissent in the *Electrical Workers* case, is immediate cause of the dispute. For purposes of 8(b)(4)(A) all the men working on the job should be considered the general contractor's employees; he should not be allowed to insulate himself from the effects of having non-union men work side by side with union men simply because the custom and structure of the industry places a subcontractor between him and direct employment of the non-union men. In other words, the test should be whether the direct employer of the non-union men (the subcontractor) is sufficiently closely connected both geographically and economically with the direct employer (the general contractor) so that the labor policies of the one may be attributed to the other. The contractor-subcontractor relationship in the construction industry should be held to satisfy this test.
>
> The general contractor, however, should be regarded as the employer of a subcontractor's employees only for purposes of that job where the two contractors are working together. Therefore, although a construction union trying to organize any subcontractor on a project should have the right to picket the entire project, it should not be permitted to extend its activity to other sites on which the picketing is to organize a particular job, the geographical boundaries of that job should mark the confines of the dispute.

The Third Circuit had explained it as follows:

> This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project. (At p. 640.)

This view of the proviso's purpose is also set forth in *Drivers Local 695* v. *N.L.R.B.*,[8] where the Circuit Court, in pertinent part, stated:

> "The purpose of the Section 8(e) proviso was to alleviate the friction that may arise when union men work continuously alongside non-union men on the same construction site.[22]"

[22] See *Essex County & Vic. District Council of Carpenters, etc.* v. *N.L.R.B.*, 332 F.2d 636, 640 (3rd Cir. 1964); *N.L.R.B.* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 692, 71 S. Ct. 943, 95 L. Ed. 1284 (1951) (Douglas J. dissenting); Comment, *Hot Cargo Agreements Under the National Labor Relations Act: An Analysis of Section 8(e)*, 38 N.Y.U.L. Rev. 97, 111 (1963); Comment 45 CORNELL L.Q. 724, 753 (1960).

And the dissent[9] in *Denver Building*, referred to in *Drivers Local 695*, stated:

> "The employment of union and nonunion men on the same job is a basic protest in trade un-

[8] 361 F.2d 547, 551 (C.A. D.C., 1966).
[9] Justices Douglas and Reed.

ion history. That was the protest here. The union was not out to destroy the contractor because of his antiunion attitude. The union was not pursuing the contractor to other jobs. All the union asked was that union men not be compelled to work alongside nonunion men on the same job. As Judge Rifkind stated in an analogous case, 'the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it.'[1]

"The picketing would undoubtedly have been legal if there had been no subcontractor involved — if the general contractor had put nonunion men on the job. The presence of a subcontractor does not alter one whit the realities of the situation; the protest of the union is precisely the same. In each the union was trying to protect the job on which union men were employed. If that is forbidden, the Taft-Hartley Act makes the right to strike, guaranteed by § 13, dependent on fortuitous business arrangements that have no significance so far as the evils of the secondary boycott are concerned. I would give scope to both § 8(b)(4) and § 13 by reading the restrictions of § 8(b)(4) to reach the case where an indus-

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[1] *Douds* v. *Metropolitan Federation*, 75 F. Supp. 672, 677.

trial dispute spreads from the job to another front.[2]

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[2]See the opinion of Judge Fahy below, 87 U.S. App. D.C. 293, 186 F.2d 326; and the dissenting opinion of Judge Clark, *International Brotherhood* v. *N.L.R.B.*, 181 F.2d 34, 40.

It seems clear from the foregoing, even before proceeding to consideration of the relevant Board decisions from *Centlivre* to the present, that the construction industry proviso has been recognized as privileging what may be characterized as "Denver Building Agreements" confined to the site of construction. That is, while the Supreme Court decision in *Denver Building* was not overruled,[10] *agreements* covering *Denver Building* relationships at a construction site were exempted from the prohibition of Section 8(e).[11]

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[10]That *Denver Building* was not "overruled" by the Supreme Court's decisions in *General Electric*, 366 U.S. 667, and *Carrier*, 376 U.S. 492, is fully set forth in the Board's decision in *Markwell and Hartz*, 155 NLRB 319, enfd. 387 F.2d 79 (C.A. 5); see also 383 F.2d 562 (C.A. 6). *Markwell and Hartz*, however, gives no support to the contentions of the Charging Party concerning construction industry on-site *agreements*.

[11]*Denver Building* itself points away from the Charging Parties' contentions. Thus it appears that the neutral general contractor there, Doose and Lintner, did not employ electricians but, rather, subcontracted electrical work to the primary nonunion electrical contractor, Gould and Preisner. Indeed the Supreme Court, in rejecting the Union's contention that it had a primary dispute with Doose and Lintner in seeking to force Doose and Lintner to make the project an all-union job, pointed out that "If, for example, Doose and Lintner had been doing all the electrical work on this project through its own nonunion employees, it could have replaced them with union men and thus dispose of the dispute." (At p. 688.)

In sum then, since the construction industry proviso deals with "secondary" agreements, the "community of interest" involved is not tied to concepts of "unit work preservation" but rather to interests of those doing work (or business) at the jobsite. And based on this interest Congress permitted agreements there which, being "secondary" would otherwise and elsewhere be prohibited.

The legislative history supports this view. As pointed out by the Board in *Centlivre* at footnote 17:

> "The intent of Congress to retain the then existing law in connection with secondary boycotts in the construction industry is apparent from the following statement by the House conferees:
>
> "*The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project,* or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case *(Local 1976, United Brotherhood of Carpenters* [*and Joiners of America, AFL, et al. (Sand Door & Plywood Co.)*] v. *N.L.R.B.*, 357 U.S. 93 (1958)). *To the extent that such agree-*

> *ments are legal today under Section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by Section 8(e). The proviso applies only to Section 8(e)* and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* case and the *Moore Drydock* cases would remain in full force and effect. The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project. Restrictions and limitations imposed upon such picketing under present law as interpreted, for example, in the U.S. Supreme Court decision in the *Denver Building Trades* case would remain in full force and effect .... House Conference Report on Labor-Management Reporting and Disclosure Act of 1959, House Report 1147, 86th Cong., 1st sessions, pp. 39-40." [Emphasis supplied with respect to portions bearing on "agreements."]

This is supported further by the statements of Senators Kennedy and Goldwater in the legislative history. Senator Kennedy explained the 1959 amendments as follows:

> *"The first proviso under new section 8(e) of that National Labor Relations Act is intended to preserve the present state of the law* with

respect to picketing at the site of a construction project and *with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.*

"*This proviso affects only section 8(e)* and therefore leaves unaffected the law developed under section 8(b) (4). The Denver Building Trades (341 U.S. 675) and the Moore Drydock (92 N.L.R.B. 547) cases would remain in force.

"*Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them.*[12] Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the Sand Door case (357 U.S. 93) is applicable.

"It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.

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[12]Relied on by the Board in *Carvel*, 152 NLRB 1672, discussed below.

"It should be particularly noted that *the proviso relates only to 'contracting or subcontracting of work to be done at the site of the construction.'* The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite. [II Leg. Hist. Act of 1959, 1433(3).]"
(Emphasis supplied.)

And Senator Goldwater stated:

"There is a further exemption from the prohibitions against 'hot cargo' agreements only, under section 8(e), with respect to a segment of the building construction industry and the labor unions representing employees in that segment of the industry. This exemption is granted only where the employer with whom such an agreement is signed is in the construction industry and engages only in construction work at the site; it does not apply where the employer, although in the construction industry, is not engaged in construction work at the site such as enterprises primarily engaged in supplying or transporting building construction materials. *Where an employer falls into this limited category, it is not an unfair labor practice for such employer and a labor union to enter into an agreement* whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, trans-

porting or otherwise dealing in any of the products of another employer, or to cease doing business with any other person, and *such an agreement is not per se unlawful.* Unlike the exemption for the apparel and clothing industry, the prohibitions of the secondary boycott ban in section 8(b)(4), as amended, are however, applicable to these situations.

"Thus, although *employers and unions who are under this exemption may lawfully enter into such agreements,* and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint — economic or otherwise — may be used by any party to such an agreement, even if entered into voluntarily by both parties, to compel the other party to live up to the contract or to refrain from breaching it." [II Leg. Hist. (1959) 1858(1)]
(Emphasis supplied.)

Turning now to consideration of relevant Board law from *Centlivre* to the present, the Board decisions provide no support, but rather undercut, the contentions of the Charging Parties.[13] In *Centlivre* itself, the Board, in accepting the view of the Circuit Courts which had

[13] *Building Material & Construction Teamsters Union Local No. 216 (Bigge Drayage Co.),* 198 NLRB No. 130, and *General Teamsters Local 386 (Construction Materials Trucking, Inc.),* 198 NLRB No. 129, cited on appeal for the proposition that such agreements are secondary in nature and therefore illegal, are not in point because they do not relate to on-site work.

"uniformly rejected" the prior Board view, stated: "in essence these [Court] cases hold that the Board failed to give sufficient scope to the construction proviso to Section 8(e)." The Board then treated the clauses there involved as within the construction industry proviso to Section 8(e).[14] And the facts of *Centlivre* run contrary to the contentions of the Charging Party here. The Respondent Unions there included a Construction Trades Council and affiliated locals, including Painters, Laborers, Carpenters, Plumbers, Sheet Metal Workers, Iron Workers, and Electrical Workers. Also Respondent was a Bricklayers Local. The Respondent Unions sought from Centlivre, a general contractor, the "secondary" clauses set forth on p. 861 of the Board decision. These agreements would have required of Centlivre that only signatories to a contract with Respondent Unions would be permitted to work on the construction site.[15] As set out in the Trial Examiner's decision:[16]

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[14]The Board in footnote 11 of its decision stated:

> "Neither the General Counsel nor the Charging Party disputes the proviso's application to the clauses in question. Accordingly, there being no issue before us as to the validity of such clauses, we assume, for purposes of this case, that they are within the proviso and lawful.

There is no indication, however, that this reservation had any relationship to the factors argued for by the Charging Party in the instant case. (See discussion of *Colson and Stevens* below.) Rather, it appears that the reservation is related to "self-help" issues decided shortly thereafter by the Board in *Muskegon*, 152 NLRB 360, since the clauses in *Centlivre* did contain "self-help" provisions. See *Centlivre, supra*, at p. 861.

[15]Supra, p. 856 and fn. 13.

[16]Supra, p. 859

> "As general contractor, Centlivre itself employed 6 to 9 laborers, carpenters, and cement finishers. It subcontracted particular craft operations to various firms in the Ft. Wayne area."

Centlivre had no collective-bargaining contract or relationship with the Respondent Unions. And since Centlivre employed only laborers, carpenters and cement finishers, the subcontracting agreement restrictions would have applied to work of a kind Centlivre's own employees did not perform. Thus it is entirely clear that the elements contended for by the Charging Parties in the instant cases as determinative for the validity of an on-site agreement under the construction industry proviso were absent in *Centlivre* and the Board, nevertheless, treated the clauses as within the construction industry proviso.

Significant too is the fact that in *Colson and Stevens* itself, (where the facts were very like those in the instant case) the factors the Charging Parties here contend to be preconditions to proviso validity did not exist. That is, Colson had no collective-bargaining agreement or relationship with the Unions there involved and the subcontracting agreement sought covered work which employees of Colson did not perform. Thus the Unions there (Carpenters and Laborers) sought to compel Colson to grant recognition covering carpenters whom he did employ. But the Unions also sought an agreement with secondary subcontracting restrictions concerning any work Colson subcontracted and

not confined to carpentry work.[17] The Board, based on its pre-*Centlivre* view that only *voluntary* agreements were within the construction industry proviso to Section 8(e), found a violation on that basis. There is no scintilla of suggestion in the Board's decision that, had the subcontracting agreement sought by the Unions been "voluntarily" entered into, the Board might nevertheless have viewed the agreement as outside the construction industry proviso. So the underlying relevant facts of *Colson and Stevens,* just as in *Centlivre,* are at odds with the contentions of the Charging Parties here.

The Board's holding in *Church's Fried Chicken,* 183 NLRB No. 102, on the facts there, is also directly contrary to the contentions of the Charging Parties. While finding a violation of Section 8(b)(7)(C) of the Act, the Board, upon exceptions filed, affirmed the dismissal of the 8(b)(4)(A) and (B) allegations of the complaint. This was based on the Trial Examiner's full discussion of the Section 8(b)(4) issues. Thus the Trial Examiner pointed out that a violation of Section 8(b)(4)(A) would require a finding that the Union was attempting to have Church sign an agreement violative of Section 8(e). And this entailed a determination whether Church was "an employer in the construction industry." Upon concluding, after discussion of the legislative history, that Church was such an employer, the Trial Examiner found that the agreement which the Union sought would not have been violative of Section 8(e) because of the construction industry proviso,

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[17]See *Colson, supra,* at p. 1650 and 1651, and fn. 1.

and in consequence, no violation of 8(b)(4)(A) could be found. As pointed out by the Trial Examiner "Church, instead of employing a general contractor, acted as its own prime contractor through ... its construction superintendent." It is clear that Church had no collective-bargaining agreement or collective-bargaining relationship with the Respondent Building Trades Council, nor did Church directly employ employees of the crafts which might be represented by affiliates of the Respondent Building Trades Council.[18] The holding in *Church's Fried Chicken* then also negates the Charging Party's contention.

The Board's post-*Centlivre* decisions giving broad scope to the proviso also militate against the Charging Parties arguments. Thus in *Muskegon,* 152 NLRB 360, the Board considered the validity under Section 8(e) of the following clause:

> "It is agreed that the members of Bricklayers Local Union No. 5 may refuse to work on any job where *any of the work, irrespective of craft,* is performed, has been performed, or is to be performed by craftsmen who enjoy less favorable *wages and working conditions* than is provided in the *current collective-bargaining agreement between the equivalent* Muskegon County Building Trades *Local Union and its contracting employers.* Such refusal shall not be grounds for discharge or other disciplinary

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[18] With the possible exception of a laborer. See p. 3 of Trial Examiner's Decision.

> action, but shall be regarded as a failure of the employer to provide suitable work." (Emphasis supplied.)

As emphasized in the Board decision itself, the clause permitted a strike by members of the Bricklayers Union where *any of the work, irrespective of craft,* is, has, or is to be performed by craftsmen who enjoy less favorable wages and working conditions than is provided in the current collective-bargaining agreement *between the equivalent Building Trades Union and its contracting employers.* The Board, in a detailed discussion, held the clause to be within the ambit of Section 8(e) and beyond the construction industry exemption solely because of the self-help feature which the clause contained.[19]

Thus the agreement between the Bricklayers and Muskegon, apart from its "self-help" features, was viewed as valid under the proviso, though it was applicable "irrespective of craft" and was conditioned on the "wages and working conditions ... in the collective bargaining agreement between the equivalent ... Local Union and its contracting employers."

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[19] This is made clear in the decision itself and, particularly footnote 13, where the Board rejected the General Counsel's contention based on *Colson and Stevens,* 137 NLRB 1650. The Board, citing *Centlivre,* noted that it had:

> "recently reversed *Colson and Stevens* and now holds that picketing to obtain a contract clause which is within the construction industry proviso to Section 8(e) does not violate Section 8(b)(4)(A).

Then in *Carvel*, 152 NLRB 1672, the Board considered the validity of the following clause:

> "The Employer [Carvel] agrees that no journeyman or apprentice who is a member of Local 217 ... will be assigned to work or expected to work or required to work, on any job or project *on which a worker or person, is performing any work within the jurisdiction of Local No. 217*, if said worker or person is performing such work for wages, hours or under any *conditions* of employment, which are different from those established by this agreement." (Emphasis supplied.)

While again finding, as in *Muskegon*, that the clause was unprivileged because of its "self enforcement provisions", the Board clearly viewed the clause as otherwise within the construction industry exemption. The Board specifically rejected the contention there made that the proviso was inapplicable because the contract provision did not refer to the "contracting out" or "subcontracting" of unit work and affected persons and employers with whom Carvel had no contractual relationship.[20] The Board stated:

> "... the application of the proviso does not, in our view, depend on the precise relationship between Carvel with whom the Union has a contract and other employers and persons on the job, in this instance the general contractor

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[20] At p. 1677 and fn. 8.

> and Ballard, who may be affected by the enforcement of the contractual proviso. The language of the proviso itself does not limit its applicability to the 'contracting out' or 'subcontracting' of work by the employer with whom a union has an agreement within the scope of Section 8(e). Indeed, were the proviso given such a limited applicability, it would be of little effect, for aside from the general contractor on a job, the various firms involved normally have control only of 'unit' work — that is, the particular work for which they hold a subcontract. Restrictions on the right to subcontract such work could well be primary, and thus lawful without reference to the construction industry proviso, because they are wholly outside the scope of 8(e)." (At p. 1676.)

The Board decision in *Ets-Hokin*, 154 NLRB 839, followed as recently as *Baltimore Contractors*, 190 NLRB 415, also reflect the breadth given to the construction industry proviso except where "self-help" provisions are included in the agreement. In *Ets-Hokin*, the clause at issue provided:

> "The Local Unions are part of the International Brotherhood of Electrical Workers and any violation or annulment of working rules or agreements of *any other Local Union of the IBEW*, or the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW as the collective-bargaining

> representative *on any electrical work in the jurisdiction of this or any other such Local Union by the Employer,* will be sufficient cause for the cancellation of this agreement, after the facts have been determined by the International Office of the Union.

The Board in *Ets-Hokin* and in subsequent cases collected in *Baltimore Contractors, supra,* treated such a clause as within the construction industry proviso.

Thus, the Board decisions since *Centlivre* have either held or viewed the construction industry proviso as privileging what may be characterized as *Denver Building* on-site agreements despite the absence of the factors which the Charging Parties here contend are required conditions of proviso exemption, where the facts were not at odds with those of the Charging Parties' cases. And the full scope given to the proviso in such decisions points directly away from the Charging Parties' contentions.

And if, as the Board has held in cases discussed above, the exemption applies where the "agreeing" employer has no employees of the kind or craft involved,[20A]

20A As a matter of fact the Board has held, with court approval, that a "person" can violate 8(e) by entering into a proscribed agreement with a labor organization *International Association of Machinists & Aerospace Workers, AFL-CIO (Lufthansa German Airlines),* 197 NLRB No. 18, enfd. 85 LRRM 2257 (C.A. 9 January 9, 1974). Thus, if a person who employs no one can violate 8(e) it would be axiomatic that such a person could enter into a privileged 8(e) proviso agreement absent a showing that Congress intended the proviso to be narrower in coverage than the prohibition to which it is an exception.

there is no reason to attach significance to whether the agreement is in a "collective-bargaining contract" or whether there is a "collective-bargaining relationship" between the union and employer (for instance, the general contractor) party to the agreement. Since any such "collective bargaining contract" would not fix general terms and conditions of employment for any of the employer's own employees, no independent significance appears with respect to this contention of the Charging Parties.

The Court decision in *Connell, supra,* involving issues under the anti-trust laws, has also been carefully and fully considered in light of the foregoing discussion based on cases arising under the Act itself. With the fullest respect to the Court, we see no basis for relying on the dictum of the majority view and the discussion in the minority opinion of *Connell* which would warrant rejection of the foregoing discussion and analysis. Thus the Court in *Connell* was apparently of the view that the absence of a "collective bargaining relationship" would preclude a finding that the construction industry exemption to Section 8(e) might operate. And the Court apparently believed that this question has not been considered by the Board and Courts.

But these arguments[21] (the absence of a representable

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[21]The Charging Parties here argue that the fundamental representation concepts and policies reflected in Section 9(a) and 8(b)(7), when read in conjunction with the exception expressly created in 8(f), are undermined by permitting picketing for subcontracting agreements of employers who do not employ workers in the craft represented by such unions. See footnote 6 above and the discussion below concerning the "equities" position in the dissenting opinion of *Connell*.

class of employees and its variant — the absence of a collective-bargaining relationship) are essentially indistinguishable from those rejected by the Board and Courts in the past. Thus, in addition to the above discussion, it should be noted that the absence of an employment relationship theory was directly before the Court in *San Bernadino.*[22] There, in supporting its argument that the agreement sought had an unlawful secondary effect, the Board offered the following analysis:

> "In the context presented in this case, where the subcontractor clause is sought to be imposed upon a general contractor for whom subcontracting is the normal mode of carrying on his enterprise ... the terms of Article I-F and its uniform interpretation by the Union show [that] the clause amounts to a commitment by the signatory employer to use only AFL-CIO subcontractors, and, accordingly, to boycott another employer for reasons not strictly germane to the economic integrity of the principal work unit.
>
> "Indeed, Article I-F limits the category of permitted subcontractors *even in those crafts which, by hypothesis, the signatory employer does not himself employ.* The record contains no evidence as to the number of [the prime contractor's] employees, if any, nor as to their

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[22] ***Building and Construction Trades Council of San Bernadino and Riverside Counties, et al.* v. *N.L.R.B.*, 328 F.2d 540 (D.C. C.A., 1964).**

> craft or trade. But it is improbable that ... a small contractor, actually hires members of the entire range of trades represented in home construction; even the largest general contractors tend to employ only persons in the basic trades, subcontracting the specialty work. Article I-F, however, makes no distinction according to whether or not a subcontractor could be 'competing' with the signatory employer's own employees. Thereby it reveals its purpose to cause a boycott of 'nonunion' (i.e., non-AFL-CIO) subcontractors."
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> (Board brief in *San Bernadino*, pp. 41, 42, citations omitted. Emphasis supplied.)

The D. C. Circuit Court was not persuaded, rejecting, *sub silento*, the absence of a "collective-bargaining relationship" between the picketing Council and picketed employer as a basis for finding subcontracting agreements unprotected by the building and construction proviso to 8(e).

And in *Colson and Stevens*,[23] in the Ninth Circuit Court of Appeals, the Board relied upon the context of requirements under Section 8(b)(3) and 8(d) of the Act. Thus, in describing the "secondary subcontractor clause" in issue, the Board briefly characterized it as a "regulation of third party relationship extrinsic to

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[23] *Construction Production & Maintenance Laborers Union, Local 383, AFL-CIO and United Brotherhood of Carpenters and Joiners of America, Local 1089, AFL-CIO* v. *N.L.R.B., (Colson and Stevens Construction Co.)*, 323 F.2d 422 (C.A. 9, 1963).

the employment relationship" and therefore as involving a non-mandatory bargaining subject which the unions could not strike to obtain (Board's brief at p. 26).

With respect to the dissenting opinion in *Connell*, Judge Clark presented two approaches to the Section 8(e) on-site proviso, one based on equitable considerations and the other based on his view of the legislative history.

The legislative history of the construction industry proviso and its interpretation in cases arising under the Act is dealt with at length earlier. It is not repeated here. As for the dissenting Judge's views concerning "one shot" agreements and the pattern of bargaining in the construction industry prior to enactment of the 1959 amendments to the Act, the Board's brief in *Colson and Stevens*, supra, is enlightening. There, in discussing the construction industry practice legitimized by the proviso, the brief states:

> "As was pointed out in a 1950 study of building trades bargaining in the 12 counties of southern California, where a master agreement establishing basic employment standards has been in effect since 1941 in which 19 building trades unions participate together with the 10 building trades councils and the major contractors' associations, 'for the well-established employers, it is also important to have a floor under competitive labor costs.' The structure of the industry, with subcontracting a customary way of doing business, leads employers to favor subcontracting clauses as a means of under-

girding such a 'floor.' The Southern California master labor agreement referred to above contains such a clause, similar to the clause that the petitioner Unions sought to force upon Colson, as a result of which 'any subcontractor [of a signatory contractor] who attempts to depart from the established union standards' faces cancellation of his contracts and an immediate loss of business.' On the other hand, if the contractor is unwilling in [these] circumstances to cancel the contract, or if he lets a subcontract to one who refuses to become bound by the master labor agreement, then the signatory contractor faces suit by the unions for specific performances with an interruption of work on his project occasioned by a change of subcontractors, and perhaps a damage suit by the ousted subcontractor. The bargaining pattern, with these effects, Congress believed legitimate and left lawful ...." (Board's *Colson and Stevens* brief, pp. 19-21.)

This is particularly significant when it is realized that organizing in the building and construction industry both prior to and subsequent to the 1959 amendments, was and is primarily carried on by building and construction trades councils on behalf of their constituent craft locals. The building trades agreements proffered are not conventional collective-bargaining agreements, nor is a conventional collective-bargaining relationship sought, but rather an attempt is made to

obtain skeleton agreements[24] (containing little more than subcontracting provisions) which in turn are augmented by the execution of collective-bargaining agreements by the individual trade unions, the latter agreements containing provisions governing wages and other substantive conditions of employment. As the Court observed in *Dallas Building and Construction Trades Council* v. *N.L.R.B.*, 396 F. 2d 677 (C.A. D.C.), at p. 682:

> ". . Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry; and in 1959 'umbrella' agreements like the one proposed here were, as they are today, commonplace, for collective-bargaining is traditionally conducted at several levels in the construction industry . . . ."

Under this arrangement the building and trades council is as much as a "stranger" to the general contractor and his employees, if any, as the Plumbers Union was to Connell. The subcontracting clause encased in such a trades council "shell" agreement can no more be said to be obtained in the context of a collective-bargaining relationship than the proviso agreement sought or obtained in such cases as *Colson and Stevens, supra, Centlivre, supra,* and *Church's Fried Chicken, supra.*

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[24]The text of a typical building and construction trades council agreement is set forth in detail in *Dallas Building and Construction Trades Council*, 164 NLRB 938, fn. 2 at p. 940.

As for the "equities" raised in the dissenting opinion, they have been substantially dealt with by the Board and Courts in cases under Section 8(b)(7) of the Act. Thus, the Board and Court in *Dallas General, supra,* have pointed out the absence of any inconsistency between the Board's interpretation of Section 8(b)(4) and the purposes of Section 8(e). The Court in *Dallas General* pointed out that "Sections 8(b)(7) and 8(e) are aimed at wholly different problems." Thus, the cases make clear that while considerations involving Section 9(a) selection of a bargaining representative may be directly related to Section 8(b)(7) of the Act,[25] such considerations are unrelated to "secondary" agreement issues under Section 8(e).

In view of all the foregoing, including Supreme Court and Circuit Court decisions, relevant legislative history and the Board's post-*Centlivre* decision, we find the contentions of the Charging Parties to provide no basis to establish under current Board law, violations of either Section 8(e) or 8(b)(4)(A) of the Act.

/s/ PETER G. NASH
Peter G. Nash
General Counsel

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[25]See, e.g., in addition to *Dallas General, supra, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council, AFL-CIO,* 168 NLRB 538, enf. 415 F.2d 656 (C.A. 9); *Los Angeles Building and Construction Trades Council, et al., (Lively Construction Co.),* 170 NLRB 1499; *Church's Fried Chicken, supra;* and *Construction Trades Council of Philadelphia and Vicinity (Samuel E. Long, Inc.),* 201 NLRB No. 42, enfd. 485 F.2d 680 (C.A. 3, 1973).